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An Independent Judiciary or an Evanescent Dream

Frank J. Battisti*

Although legislative attempts to devise alternatives to impeachment as a means for removing federal judges have failed, recent efforts along these lines have been undertaken by the judiciary. As Chandler v. Judicial Council demonstrates, circuit councils have assumed the power to effectively remove a judge from office under the broad grant of authority in 28 U.S.C. section 332(d). The author views this development as a serious threat to the independence of the federal judiciary. After examining the history and function of the Constitution's impeachment provisions, he concludes that the Framers intended impeachment to be the sole method of removing a federal judge from office.

THE FOUNDING Fathers placed their hopes for the preservation of our liberty in an independent judiciary. The concept of independence surrounding the "third branch" has vague parameters, but it certainly includes the notion that judges must be free of all influence or control. The soon-to-be Chief Justice, John Marshall, in a debate on the Constitution in the Virginia Convention, proclaimed:

The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he [the judge] should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary.¹

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1. Address by John Marshall, Virginia State Convention of 1829-1830, quoted in O'Donoghue v. United States, 289 U.S. 516, 532 (1932).

In order to guard against any infringement of judicial independence, the Framers of the Constitution carefully circumscribed procedures for the appointment and removal of judges, limiting powers which in the past had been subject to abuse.² The Constitu-

2. The fear of a dependent judiciary was well grounded in English history. The delegates to the Constitutional Convention were certainly aware of the centuries-old struggle for judicial independence in England. From the earliest days, judges were appointed by the Crown and given "patents," which fixed their tenure *durante bene placito*, at the pleasure of the Crown. See Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 *FORDHAM L. REV.* 1, 10 (1970) [hereinafter cited as Feerick]. The procedure for removing a judge was quite simple. The King merely revoked his patent. *Id.* The arbitrariness of the appointment and the removal processes resulted in a judiciary generally subservient to the royal will.

Absolute monarchy reached its heyday during the reign of the Stuart Kings, from 1603 to 1704, except during the Commonwealth, from 1649 to 1660. It is not surprising, therefore, that the judiciary during this period was largely "a politics-ridden bench, a seat on which was dependent on doing what the exigencies of royal government demanded, [which] sank to the lowest point in English judicial history." R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 39 (1957) [hereinafter cited as R. POUND]. The removal of judges for decisions unfavorable to the Crown or for refusing to agree in advance to decide cases according to the King's wishes was quite common.

The monarchy had no monopoly on removing judges with whom it disagreed. In 1641 the Long Parliament impeached and removed from office Sir Robert Berkley and other judges who had written opinions in the "ship money" cases contrary to Parliamentary wishes. See R. POUND 39; Feerick 7. The precarious state of judicial tenure was eased somewhat by passage of the Act of Settlement, 12 & 13 Will. 3, c. 2, § 3, at 360 (1701), which provided that judicial commissions be made *quamdiu se bene gesserint*, during good behavior. *Id.* See generally Ervin, *Separation of Powers: Judicial Independence*, 35 *LAW & CONTEMP. PROB.* 108, 111-12 (1970) [hereinafter cited as Ervin]; Feerick 11-12. However, despite the fact that judicial "tenure was far more secure than it had been under the Stuarts . . . they enjoyed at best a limited independence." Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 *SUP. CT. REV.* 135, 137 [hereinafter cited as Ziskind]. See also Ervin 111.

Although English judges had achieved some independence by the middle of the 18th century, colonial judges had not. Colonial judges were either appointed by the Royal Governor or commissioned directly in England. See Feerick 13. Instructions as to tenure often were ambiguous and some governors assumed that judicial commissions were to be "during good behavior" following the English model. *Id.* However, the authorities in England soon made it clear that commissions to colonial judges were to be issued solely during the pleasure of the Crown. See Ervin 112; Feerick 12-13. The implication to the colonists was clear: a dependent judiciary was yet another means whereby the English government kept the colonies under its sway. Significantly, one of the complaints lodged against George III in the Declaration of Independence was that he "has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

tion assigned to the President the power of appointment with the advice and consent of the Senate.³ The removal power was bifurcated, the House of Representatives being granted "the sole power of Impeachment,"⁴ and the Senate "the sole power to try all Impeachments."⁵ The drafters were particularly concerned that the removal power could present a possible threat to judicial independence.⁶ Accordingly, they provided that judges should hold their office "during good Behaviour"⁷ and the grounds for impeachment and removal should be "Conviction of Treason, Bribery, or other high Crimes and Misdemeanors."⁸ No other means for removing a federal judge are enumerated within the Constitution.⁹ Mr. Justice Black gave the following succinct expression of the genius of our sys-

3. U.S. CONST. art. II, § 2.

4. *Id.* art. I, § 2.

5. *Id.*

6. Justice Story commented upon the necessity for ensuring that the tenure of judges not be subject to alteration by the other branches of government:

If then, the courts of justice are to be considered, as the bulwarks of a limited constitution against legislative encroachments; this consideration will afford a strong argument for the *permanent* tenure of judicial offices, since nothing will contribute, so much as this, to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty.

III J. STORY, COMMENTARIES 459-60 (1833). See also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 562, 566 (1816).

7. U.S. CONST. art. III, § 1. Alexander Hamilton, a delegate to the Constitutional Convention, explained the importance of the good behavior provision in *The Federalist No. 78*:

The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince. In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws.

THE FEDERALIST No. 78, at 522 (J. Cooke ed. 1961) (A. Hamilton) [hereinafter cited as *THE FEDERALIST*].

8. U.S. CONST. art. II, § 4.

9. Indeed, Hamilton's comments suggest that the omission to state alternative means for removing judges was premeditated:

The precautions for their [the judges'] responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our constitution in respect to our own judges.

THE FEDERALIST No. 79, at 532-33.

tem in his dissent in the case of *Chandler v. Judicial Council*:¹⁰

No word, phrase, clause, or even the Constitution taken as a whole, gives any indication that any judge was ever to be partly disqualified or wholly removed from office except by the admittedly difficult method of impeachment by the House of Representatives and conviction by two-thirds of the Senate. Such was the written guarantee in our Constitution of the independence of the judiciary, and such has always been the proud boast of our people.¹¹

The *Chandler* case involved the "partial disqualification" of a federal district judge by a judicial council order which prohibited the regular assignment of cases to Judge Chandler.¹² It was upon the Supreme Court's refusal to entertain the judge's application for an extraordinary writ¹³ that Justice Black expressed his fear that:

Unless the actions taken by the Judicial Council in this case are in some way repudiated, the hope for an independent judiciary will prove to have been no more than an evanescent dream.¹⁴

In *Chandler*, the circuit council purported to act under authority alleged to have been granted by the broad language of 28 U.S.C. section 332(d):

Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.¹⁵

The *Chandler* case points up the urgent need for the repeal of section 332(d).¹⁶ Without such action, the vague and overbroad lan-

10. 398 U.S. 74 (1970).

11. *Id.* at 142 (Black, J., dissenting).

12. See text of order at note 155 *infra*.

13. See 398 U.S. at 76.

14. *Id.* at 143 (Black, J., dissenting).

15. 28 U.S.C.A. § 332(d) (Supp. 1974).

16. The genesis of this controversy is the Congress' failure to provide any enforcement mechanism to implement § 332(d)'s grant of power to the circuit councils to issue "orders" to district judges. As Chief Justice Burger noted in *Chandler*:

Congress did not spell out procedures for giving coercive effect to council orders, and the legislative history sheds no light on whether Congress intended this statute to be implemented by regulations . . . Legislative clarification of enforcement provisions of this statute and definition of review of council orders are called for.

398 U.S. at 85 n.6. Perhaps Congress' failure so to provide indicates that it envisioned the directives of the council to be of an administrative rather than judicial nature and as such without the same need for enforcement mechanisms. See P. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 417 n.223

guage of the section will continue to present a significant threat to the independence of the federal judiciary.

To understand the nature of this threat, one must begin with a brief history of the creation of the Judicial Conference of the United States and the judicial councils, both of which evolved in light of the need for improved administration of the federal court system.¹⁷

The act that created the Judicial Conference was passed by Congress in 1922.¹⁸ The bill represented a major innovation designed to relieve congestion in the federal courts.¹⁹ The conference was granted the power to carry out a plan for intercourt assignment of judges to and from the district courts and courts of appeals.²⁰

The creation of this body was the first step toward the goal of centralizing administrative organization and responsibility within the judiciary.²¹ To this end the Conference was to make an annual sur-

(1973) [hereinafter cited as P. FISH]. See also *Hearings on H.R. 599 Before the House Comm. on the Judiciary*, 76th Cong., 1st Sess. (1939). See generally P. FISH 417-26.

Despite the absence of express sanctions, various disciplinary uses of council authority have been implemented. Freezing a judge's docket temporarily until he has worked through a backlog of cases is not unheard of, see Letter from Henry P. Chandler to Harold R. Medina, Jan. 8, 1952, cited in P. FISH at 419, although it is extremely unpopular with district judges. See Letter from Sylvester J. Ryan to J. Edward Lumbard, Dec. 7, 1960, cited in *id.* However, as the *Chandler* case demonstrates, the councils' powers of assignment may be misused to accomplish a feat beyond their jurisdiction—the removal of a federal judge.

28 U.S.C. § 372(b) (1970), see note 65 *infra*, gives the councils limited authority to replace a judge certified as physically or mentally disabled. Apparently, the council may also remove a nontenured court official by order to the district court. See P. FISH 420; cf. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258-59 (1839).

17. See generally P. FISH 33-39, 125-65.

18. Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 838.

19. See P. FISH 33.

20. Act of Sept. 14, 1922, ch. 306, § 2, ¶ 3, 42 Stat. 838.

21. P. FISH 39. Prior to 1922, each of the inferior courts operated administratively as an autonomous and independent unit. "With complete discretion over patronage, the single district judge, who in most cases constituted the full court, appointed everyone from court clerk to bankruptcy receiver." *Id.* at 12. See also *id.* at 7. Early attempts at judicial self-administration were limited to premitting intercourt assignment of judges to assist their disabled brethren. See *id.* at 14. But cf. Act of Oct. 13, 1913, 38 Stat. 203, which gave the Chief Justice of the United States the power to transfer a district judge to the Second Circuit to ease congestion upon the certification of necessity by the chief judge of that circuit. Although this Act was limited to transfer to the Second Circuit, "it did provide an entering wedge for more extensive reforms." P. FISH 15.

vey of the dockets of all inferior courts.²² Chief Justice Taft, in his testimony before the Senate Judiciary Committee, explained: The "bill introduces a reasonable system of watching and supervising conditions by the judges of the courts of appeals."²³ It was precisely the supervisory and paternalistic role of the Judicial Conference of Senior Circuit Judges,²⁴ and the broad language of the bill, which evoked criticism in the congressional debates. Senator Thomas E. Watson warned: "The language of the bill is so vague that the convention [Judicial Conference] may virtually give orders to every district judge in the Union."²⁵ Senator John Shields protested that the Conference would be "an entering wedge for . . . an assault upon the independence of the judiciary, which may grow, . . . sap and undermine that independence."²⁶

The powers of the Conference have not undergone a marked change since its inception. 28 U.S.C. section 331 is the present source of the Conference's powers:

The conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary, and shall submit suggestions to the various courts, in the interest of uniformity and expedition of business.

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice

22. Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 838.

23. *Hearings on S. 2432 Before the Senate Comm. on the Judiciary*, 67th Cong., 1st Sess. 11 (1921).

24. There has been a radical change in the makeup of the Judicial Conference from Taft's original formulation of administrative power wielded by "the Chief Justice and the Senior Circuit Judges of the nine circuits upon conference with the Attorney General." Letter from William Howard Taft to Harry M. Dougherty, June 3, 1921, *cited in* P. FISH 31. In 1957, following the suggestion of Chief Justice Warren, representatives of the district court judges were included in the Conference's membership. *See* Act of Aug. 28, 1957, 71 Stat. 476. Membership was also expanded to include representatives of the special courts: the Court of Claims in 1956, Act of July 9, 1956, ch. 517, § 1(d), 70 Stat. 497, and the Court of Customs and Patent Appeals in 1961, Act of Sept. 19, 1961, Pub. L. No. 87-253, §§ 1, 2, 75 Stat. 521. *See* P. FISH 254, 255 nn. 131 & 132. The present statutory description of the membership of the Judicial Conference is contained in 28 U.S.C. § 331 (1970):

The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate.

25. 62 CONG. REC. 5280 (1922).

26. *Id.* at 4863.

and procedure as prescribed by the Supreme Court for the other courts of the United States. . . . Such changes in and additions to those rules as the Conference may deem desirable . . . shall be recommended by the Conference . . . to the Supreme Court for its consideration and adoption, modification or rejection. . . .

. . . .

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.²⁷

In addition, 28 U.S.C.A. section 604 charges the Conference with supervising the performance of the Administrative Office and thereby confers on the Conference additional administrative control.²⁸

Although sections 331 and 604 do not so provide, the Conference has arrogated to itself a legislative role. Without statutory authorization, the Judicial Conference has asserted the power to regulate a judge's conduct both on and off the bench.²⁹ This aggrandizement has not gone without challenge by judges who contend that the power of the Conference extends no farther than to the promotion of uniformity and expedition of judicial business.³⁰ In 1969, Judge Ainsworth, the Chairman of the Judicial Conference Committee on Court Administration, was forced to admit before a Senate subcommittee that there existed "considerable doubt that the Conference had any legal authority to regulate the conduct of the judges."³¹ Many of

27. 28 U.S.C. § 331 (1970).

28. 28 U.S.C.A. § 604(a) (Supp. 1974). On the history and function of the Administrative Office see P. FISH 166-266.

29. Under Chief Justice Stone, the Conference investigated and heard complaints involving conflicts of interest. After receiving a complaint that a district judge permitted his two sons and two nephews to practice before him, the Conference condemned his conduct and called on "the circuit councils to inquire whether such practice exists in their respective circuits, and if so, to take appropriate action." *Judicial Conference Report*, 1942 ATT'Y GEN. ANN. REP. 31. The Conference also rejected the practice of a federal judge acting as an arbitrator in cases pending before the National War Labor Board, *id.*, and instituted a mini-Hatch Act prohibiting political activity by judicial officers and employees. *Judicial Conference Report*, 1943 ATT'Y GEN. ANN. REP. 69-70; see also P. FISH 237. In 1963 the Conference once again presumed to set behavioral standards for judges when it declared that "no justice or judge appointed under the authority of the United States shall serve in the capacity of an officer, director, or employee of a corporation organized for profit." *REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES—1963*, at 62.

30. See, e.g., Letter from Charles E. Clark to Sam O. Clark, Jr., Oct. 28, 1942, cited in P. FISH 235.

31. *Hearings on S. 1506, S. 1507, S. 1508, S. 1509, S. 1510, S. 1511, S. 1512, S. 1513, S. 1514, S. 1515, and S. 1516, Judicial Reform Act, Before the*

the actions taken by the Conference in this questionable capacity substantially infringe on basic prerogatives of federal judges. In this regard, the Conference *requires* the reporting of extrajudicial income,³² it has adopted canons of judicial ethics,³³ and it has approved a "Statement of Powers, Functions, and Duties of the Judicial Councils of the Circuits," which gives the clearest of directives that the councils should act as overseers of *all* activities of federal judges.³⁴

While the Judicial Conference has come to be regarded as a centralized policymaker, the circuit councils have become the enforcement mechanism.³⁵ The judicial councils were created in 1939 by "[a]n act to provide for the administration of the United States Courts"³⁶ The primary objective of the bill was "to furnish to the federal courts the administrative machinery for self-improve-

Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 91st Cong., 1st & 2d Sess. 10 (1970).

32. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES—1969, at 42-43, 51-52; *see* CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES, Canon 6c adopted by the Judicial Conference. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES—1973, at 53 [hereinafter cited as CODE OF JUDICIAL CONDUCT].

33. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES—1973, at 53.

34. A Statement of Powers, Functions, and Duties of Judicial Councils of the Circuits was approved by the Judicial Conference on March 7, 1974. *See* REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES—1974. The rulemaking role of the Judicial Conference overlaps with its assumed authority to review the conduct of individual judges. This puts the Conference, and its administrative arms, into the sensitive position of promulgating "regulations" and "guidelines" to which judges are presumably to adhere and also of reviewing that adherence on a case-by-case basis. Such an amalgamation of administrative, legislative, and judicial functions is not without its dangers:

Qualitative expansion of conference business had thus brought the judiciary to a politically sensitive penumbra area The Judicial Conference operates in the misty realm where "lawmaking" shades into that which is wholly judicial at one pole and that which is wholly legislative at the other. It ever stands, then, at the very brink of the "political thicket."

P. FISH 243.

35. *See* Letter from Kimbrough Stone to John Biggs, Jr., Nov. 14, 1940, cited in P. FISH 152. Note, however, that the Conference began to assume a judicial role in difficult cases. P. FISH 239. *See* Guideline No. 15 of the Guidelines for the Circuit Councils in REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES—1974, at 8 [hereinafter cited as Guideline(s)]. Guideline No. 15 clearly places the Conference in an appellate role: "Where any formal order of the circuit council is not complied with, the matter shall be referred to the Judicial Conference of the United States for such action as it deems appropriate."

36. Act of Aug. 7, 1939, ch. 501, 53 Stat. 1223.

ment, through which those courts will be able to scrutinize their own work and develop efficiency and promptness in their administration of justice.”³⁷ The recent statement on council powers issued by the Conference reiterates this theme: “The purpose of 28 U.S.C. section 332 is to create a ‘system of decentralization’ by recognizing in each circuit the judicial council as ‘the operating unit in bringing about the proper administration of justice.’”³⁸

The legislative history indicates that Congress intended to grant the councils far-reaching powers.³⁹ The primary concern of the Conference, which recommended the legislation to Congress, was the time delay involved in the rendering of decisions. The bill, according to Chief Judge Groner, was designed to remedy:

[T]he present judicial set-up [where] we have no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, or to take action as to any other matter which is the subject of criticism, or properly could be made the subject of criticism, for which he may be responsible.

The bill also provides . . . that it shall be the duty of the district judge, when admonished . . . by the judicial council, to take whatever steps . . . declared to be necessary to correct those things which ought to not exist in a well-run judicial system.⁴⁰

The dialogue between Judge John T. Parker and Representative Emanuel Celler during committee hearings on the Administrative Office Act of 1939⁴¹ indicates that the only restraint placed upon council action was the expectation that circuit judges would act with good faith and moderation:

Judge Parker: This [council] can deal with all sorts of questions that arise in the administration of justice.

Mr. Celler: Do you put any restraint on the council at all?

Judge Parker: I do not think this bill does. Of course, I assume this is true: That the councils will be restrained by the inherent limitations of the situation. They would know that, if they commanded a judge to do something,

37. H.R. REP. NO. 702, 76th Cong., 1st Sess. 2 (1939).

38. Guideline No. 2, citing *Hearings on S. 188 Before the Senate Comm. on the Judiciary*, 76th Cong., 1st Sess. 20 (1939).

39. See P. FISH 156-57.

40. *Hearings on S. 188 Before the Senate Comm. on the Judiciary*, 76th Cong., 1st Sess. 11 (1939).

41. Act of Aug. 7, 1939, ch. 501, 53 Stat. 1223.

unnecessarily or unwisely, he would refuse to do it, and that would probably be the end of the matter.⁴²

Although the 1961 Report of the Judicial Conference begrudgingly speculates that "it can perhaps be argued that the provisions of the section now are as specifically applicable to a court of appeals . . . as to a district court,"⁴³ it was apparent from the beginning that the councils were to administer and "admonish" the district courts alone.⁴⁴ The statutory language clearly mandates that only "the district judges shall promptly carry into effect the orders of the council."⁴⁵ It is only a remote possibility that the members of the council could be expected to "administer" the performance and conduct of their colleagues on the court of appeals, no matter what the circumstances.⁴⁶ Yet for the mature men and women serving on the district courts, the need is felt for an "administrative tribunal charged with unbridled power to monitor their behavior."

The statute's obvious resort to paternalistic intermeddling has not been universally accepted within the judicial community.⁴⁷ Circuit

42. *Hearings on H.R. 2973 Before the House Comm. on the Judiciary*, 76th Cong., 1st Sess. 22 (1939). During the course of the same hearings, Chief Judge Groner remarked: "If he [a district judge] does fail to do it [carry out an order of a council], then I think there would be imposed on the council the duty of bringing the matter in some way to the attention of the only power in existence, in a matter of that kind, which could apply the correct remedy; that is, the Congress of the United States."

It is clear from this testimony that at least one staunch supporter of the circuit council plan did not include judicial removal among the powers granted by § 332(d).

43. See Act of June 25, 1948, ch. 646, 62 Stat. 902, which included the courts of appeals in the general definition of "courts," currently found at 28 U.S.C.A. §§ 332-33 (Supp. 1974).

44. At least one senior circuit judge, John Biggs, Jr., contended that "on its face [the law] does not apply to circuit judges"; when the council acts on appellate judges, it acts as a court, not as a council. See *Hearings on Judicial Fitness Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 12 (1966).

45. 28 U.S.C.A. § 332(d) (Supp. 1974).

46. Since the successful functioning of a court of appeals depends to a great degree on maintaining harmony among the judges, it is logical to assume that a circuit judge will be loath to question or criticize the performance or conduct of a fellow circuit judge at a meeting which the accused is required by statute to attend. See 28 U.S.C.A. § 332(a) (Supp. 1974).

47. After hearings were held on the Tydings bill, a letter was sent to every federal district judge in the United States soliciting his views on the Tydings bill. See *Hearings on the Independence of Federal Judges Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 485-545 (1970). Of more than 100 responses received, only 1 indicated support for the bill. Ervin 124.

Judge Learned Hand, for one, responded negatively to this collective intrusion into the business of the district judges. He asserted:

I am very strong for the autonomy of each court; at least I don't want the District Judges under the authority of a Senior Circuit Judge, or for that matter, of a whole bunch of Circuit Judges. If we are to have it, at least let's keep the hands of Senior Circuit Judges or any other [expletive deleted] Circuit Judge off their fellows.⁴⁸

Section 332(d) was ill-conceived. It indicates that the Congress was persuaded that circuit judges ought to possess a statutory framework to force district judges to "put their own house in order." This unwise and mischievous assumption has victimized district judges for more than 30 years. These powers have been the source of unnecessary friction between individuals who would otherwise properly concern themselves only with the specific cases and controversies before them.

The statute misconstrues the proper relationship between district and circuit judges, altering the balance between both groups of article III judges. It should be stressed that in other matters no distinction has been drawn concerning the independence and equality of federal judges. There has evolved, for instance, the custom in the federal judiciary of assigning district judges to the courts of appeals⁴⁹ and circuit judges to the district courts⁵⁰ whenever the need arises. Recognition, of course, must be given to the higher commission of the judges of the appellate courts. But this distinction is only for the purpose of reviewing decisions within the established appellate framework, not for monitoring the behavior of fellow judges.

In reality, the council mechanism which was designed to provide proper administration has served as an unwarranted and unnecessary impediment to the efficient operation of the district courts. Each district court is competent, with the help of statistical information from the Director of the Administrative Office, to fulfill the administrative duties within its jurisdictional boundaries.⁵¹ It has been my experience that no benefits have been derived from the requirements that the council approve the number of magistrates⁵² and referees

48. Letter from Learned Hand to D. Lawrence Groner, Dec. 26, 1938, quoted in P. FISH 159.

49. See 28 U.S.C. § 292 (1970).

50. See *id.* § 291.

51. 28 U.S.C.A. § 604(2) (Supp. 1974).

52. See 28 U.S.C. § 633(b), (c) (1970).

in bankruptcy,⁵³ or recommend the number of additional district judges to the Conference, or approve plans for the defense of indigents.⁵⁴ As for delay and congestion, the individual calendar system, adopted in most jurisdictions, forces each judge to stand on his own record. In a case of undue delay, the remedy should either be the transfer of an additional judge to the district in question⁵⁵ or a writ of mandamus.⁵⁶ As the *Chandler* case indicates, council action under section 332(d), ordering a judge to hear no new cases, is power which is easily abused.⁵⁷

There may, of course, be instances where a higher authority is needed to intervene in district court affairs. If, for example, a district court is unable to agree on the division of the court's business, a remedy is obviously needed. The solution, however, is not a judicial council of circuit judges possessed of powers broader than required to deal with that particular problem. In fact, Congress has provided a closely circumscribed administrative procedure whereby the councils may step in and devise a plan for the distribution of cases among the judges of a district court.⁵⁸ And certainly if other concrete problems arise, Congress may devise equally definite remedies. It is likewise unnecessary to vest a judicial council with broad powers to deal with seeming excesses or abuses in a judge's handling of a matter before his court. In such cases, mandamus and appeal are the obvious and appropriate channels of redress.⁵⁹

53. See 11 U.S.C. § 65(b)(1) (1970).

54. 18 U.S.C.A. § 3006A(a) (Supp. 1975).

55. See 28 U.S.C. §§ 291, 292 (1970).

56. See note 59 *infra*.

57. See text accompanying notes 155-76 *infra*.

58. 28 U.S.C. § 137 (1970) provides in pertinent part:

The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.
... If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

But see text accompanying notes 155-76 *infra*, concerning the abuse of this power by the Judicial Council of the Tenth Circuit in the *Chandler* case.

59. Mandamus was deemed the proper avenue of relief in *United States v. Ritter*, 273 F.2d 30 (10th Cir. 1959); *In re Imperial "400" National, Inc.*, 481 F.2d 41 (3d Cir. 1973); and in two cases involving Judge Chandler, *Occidental Petroleum Corp. v. Chandler*, 303 F.2d 55 (10th Cir. 1962), and *Texaco, Inc. v. Chandler*, 354 F.2d 655 (10th Cir. 1966). In each of these cases, proceedings in the court of appeals for a writ of mandamus should have precluded council action under § 332. See also *LaBuy v. Howes Leather Co., Inc.*, 352 U.S. 249 (1957), where the Supreme Court held that the Court of Appeals for the Seventh Circuit properly issued a writ of mandamus ordering Judge LaBuy to vacate his order referring two antitrust cases to a special master for hearing and preparation of findings of fact and conclusions of

Of most crucial concern, however, is the council's illegitimate exercise of authority over what is appropriate conduct for a judge.⁶⁰ Here too, Congress has provided the statutory means to alleviate the few and isolated problems which could conceivably arise with respect to a judge's conduct off the bench. Specifically, judges are prohibited from accepting bribes,⁶¹ hiring relatives,⁶² and practicing law.⁶³ The judge must also disqualify himself in cases where he has a "substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper . . . for him to sit on the . . . proceeding therein."⁶⁴ In the case of a judge who is mentally or physically unfit to perform his duties, a carefully drawn method for *replacement* (not removal) can be devised which protects the rights and dignity of a disabled judge.⁶⁵ And in circumstances of improper conduct or disability, there is always the constitutionally prescribed method of removal—impeachment.

law. On the distinction between an appellate court's mandamus power and the removal power assumed by circuit councils under § 332(d) see P. FISH 421. For a general discussion on the use of mandamus to compel federal officers to perform official duties see D. SCHWARTZ & S. JACOBY, *LITIGATION WITH THE FEDERAL GOVERNMENT* §§ 16.109-.111 (1970).

60. There can be little doubt that the Judicial Conference and the circuit councils have assumed the power to regulate the extrajudicial conduct of judges. See text accompanying notes 29-34 *supra*. To this end, the Conference has adopted Canons 2, 5, and 6 of the CODE OF JUDICIAL CONDUCT. Prior to that, the Judicial Conference, by resolution, specifically authorized the councils to review the extrajudicial activities of judges for which remuneration was received. When such duties were deemed "in the public interest or [were] justifiable by exceptional circumstances," councils could permit them; otherwise they were prohibited. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES—1969, at 42. But see the action of November Session substantially modifying the June Resolution, *id.* at 50-52. See P. FISH 402. The clearest indication, however, of the broad manner assumed by the Judicial Conference and circuit councils to inquire into a judge's extrajudicial conduct is contained in Guideline No. 4. See text accompanying note 135 *infra*; accord, *Report of the Judicial Conference of the United States on the Powers and Responsibilities of the Judicial Councils*, H.R. Doc. No. 201, 87th Cong., 1st Sess. 3 (1961).

61. 18 U.S.C. §§ 201, 203 (1970).

62. 28 U.S.C. § 458 (1970).

63. *Id.* § 454.

64. *Id.* § 455.

65. *Id.* § 372(b) presently provides for the replacement of judges who are certified as mentally or physically disabled from performing their duties. This carefully circumscribed procedure for replacing a disabled judge comports with the view of Alexander Hamilton that "insanity" would be a "virtual disqualification" from continuing to sit on the bench. THE FEDERALIST No. 79, at 533. See generally P. FISH 397.

The existing authorization for the circuit councils to monitor judicial behavior is nothing less than the imposition of an easy means to remove or partially disqualify district judges. The ramifications of permitting circuit judges to pass on the good conduct of their fellow federal judges should be readily apparent. As the late District Judge Mac Swinford has stated, no judge should be beholden to any other person, including other federal judges. A subservient judge is not his own man. He becomes fungible, intimidated, and dispossessed of that independent spirit which the Founders considered essential. Any such development cannot help but result in a lethal distortion of the delicate balance of power that has been largely responsible for the preservation of our essential liberties.

Needless to say, the Congress and the judiciary should be alarmed by the dangerous thrust of section 332(d). Not only does this section promote conflict within the judiciary, but most importantly, council prerogatives over the tenure of fellow judges clearly frustrate the constitutionally mandated means for the removal of judges.

The Constitution reflects the Founding Fathers' firm belief that federal judges must enjoy substantial freedom from unwarranted interference or undue pressures. For this reason, the Constitution expressly provides that judges "shall hold their Office during good Behaviour,"⁶⁶ and shall be removed from office only after impeachment by the House of Representatives,⁶⁷ trial by the Senate,⁶⁸ and conviction by two-thirds of the members of the Senate of "Treason, Bribery, or other high Crimes and Misdemeanors."⁶⁹ The thorough delineation of the impeachment process in the Constitution demonstrates that the power of removal indisputably falls within the exclusive province of Congress.⁷⁰

Nevertheless, argument continues to rage over whether it would be constitutionally permissible to devise alternative methods for removal of federal judges. Proponents of the various alternatives contend that the impeachment mechanism is too cumbersome, too time-consuming, and too unwieldy to function well as a means of disciplining errant judges.⁷¹ The view has been expressed, for example, that

66. See note 7 *supra*.

67. See note 4 *supra*.

68. See note 5 *supra*.

69. See note 8 *supra*.

70. See text accompanying notes 4-5 *supra*.

71. See, *e.g.*, remarks of Senator Nunn upon the introduction of a bill to

Congress may, in exercise of its powers under the "necessary and proper" clause,⁷² establish machinery within the judiciary for disciplining misbehaving judges.⁷³ Legislation creating such a special court, it is argued, would merely entail a fresh grant of subject matter jurisdiction or the establishment of a new remedy. It would not, it is asserted, involve an impermissible enlargement of article III judicial power, since the special court would be passing on "cases or controversies" within the limitations imposed by that article.⁷⁴

establish a Council on Judicial Tenure, 121 CONG. REC. 3407 (daily ed. Mar. 7, 1975).

72. U.S. CONST. art. I, § 8.

73. This position was originally articulated by Professor Burke Shartel in an article supporting the constitutionality of alternative methods of judicial removal. See Shartel, *Federal Judges—Appointment, Supervision and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870 (1930) [hereinafter cited as Shartel]. Shartel's arguments are still relied upon extensively by those who believe there can be some method of removal other than impeachment under the Constitution. See, e.g., R. BERGER, *IMPEACHMENT* 178 (1973); Remarks of Senator Nunn, 121 CONG. REC. 3407-08 (daily ed. Mar. 7, 1975).

74. The theory is that Congress could pass enabling legislation to revitalize the common law writ of *scire facias*. See, e.g., R. BERGER, *supra* note 73, at 127-34. The writ of *scire facias* was used to revoke a patent after determination was made that the holder had breached the condition upon which he had held office, i.e., good behavior. See Feerick 11 n.54. Blackstone states that "where the patentee hath done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of 'scire facias' in chancery." 3 W. BLACKSTONE, *COMMENTARIES* 260 (E. Christian ed. 1807). *Scire facias*, impeachment, and removal by the "address" of both houses to the King, were the three means of judicial removal undisturbed by the Act of Settlement of 1701. See Ervin 111-12.

Shartel argues that impeachment is the exclusive means whereby the Congress may remove a judge from office. See Shartel 881. However, he contends that the common law writs of *scire facias* and *quo warranto* are still available to the judicial branch to remove members of the inferior courts. See *id.* at 882-83. Accord, R. BERGER, *supra* note 73, at 127-34. Under this view, the "good behavior" provision is nothing more than a condition of judicial tenure, whose breach results in forfeiture of office. See *id.* But see discussion at note 76 *infra*.

This position has met with substantial opposition. Merrill E. Otis, a federal district judge and legal scholar, severely criticized Shartel's proposition. See Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 U. KAN. CITY L. REV. 3 (1938). One of the major thrusts of Judge Otis' arguments against the writ is that the Constitution makes no distinction between the terms of office of inferior court judges and Supreme Court Justices. Therefore, an interpretation of the Constitution that would create such a distinction would be questionable. See *id.* at 17.

Another legal scholar, Martha Ziskind, was even more devastating in her attack on Shartel:

The clearest rejection of Shartel's argument lies in the fact that no

It is my view that impeachment is the sole avenue for judicial removal within the present constitutional framework.⁷⁵ The issue of a judge's good behavior⁷⁶ may be considered only by a court of impeachment and by no other forum, judicial or otherwise.⁷⁷ I have adopted this position based upon my reading of the Constitution and what I conceive to be the clear intent of its Framers.⁷⁸ Yet,

colonial or state constitution provided for such a use of *scire facias*, nor was a proposal made to include it during the Constitutional Convention. Even in the unreformed common law, there was a distinction between precedents and fossils.

Ziskind 138. See generally Ervin 119-21.

75. See Battisti, *The Independence of the Federal Judiciary*, 13 B.C. IND. & COM. L. REV. 421 (1972).

76. Proponents of *scire facias* appear to regard "bad behavior" as an alternative ground for removal. See R. BERGER, *supra* note 73, at 132-33. In past impeachments of federal judges, no House of Representatives indictment has been couched in any other language than the words of art contained in art. II, § 4 of the Constitution. Feerick 52. Feerick concludes that "'Good Behaviour' was an expression of 'tenure' used to secure the independence of the judiciary." *Id.*; accord, THE FEDERALIST No. 78, quoted in note 7 *supra*. Instead of construing it as an alternative ground for removal, most legal scholars interpret the "good behavior" clause to mean that "judges, unlike other civil officers, have a lifetime tenure, but, like other civil officers, may be impeached." Feerick 52. Accord, Kramer & Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behavior"*, 35 GEO. WASH. L. REV. 455, 459 (1967). A vague standard like "bad behavior" would appear susceptible to the same sort of manipulation that led the Framers to reject removal by "address," see J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 537 (A. Koch ed. 1966) [hereinafter cited as J. MADISON], and "maladministration" as a ground for removal. *Id.* at 605; accord, Feerick 52.

77. The Constitutional Convention considered various alternative means of removal, including trial by the judiciary, and rejected them. See Feerick 15-18; J. MADISON 32, 112, 116, 315, 319, 393, 535. The final version voted out of committee on September 4, 1787, provided for removal upon "impeachment by the House of Representatives, and conviction by the Senate." *Id.* 575. See generally Feerick 15-23.

78. See the comments of Alexander Hamilton in THE FEDERALIST No. 79, set forth in note 9 *supra*. Judge Otis carefully analyzed the selection of the term "sole" as a modifier of the impeachment powers described in the Constitution:

The word "sole" was used to make clear to all forever that, in the American system, no significance should be given to any English precedent, if there were any, whereby the power to charge misconduct for the purpose of obtaining removal of a civil officer from office, was held to be lodged in any other than the legislative body directly representing the whole people.

Otis, *supra* note 74, at 25-26; accord, Ervin 120. Methods of removal by the judiciary were either ignored in debate or were soundly rejected. See note 77 *supra*. The Constitution leaves the Congress no more power to alter the tenure of judges than it does the terms of the President or Vice President, see

I also believe that such a construction of our Constitution continues to reflect sound public policy. The impeachment process may be cumbersome and difficult, but it was designed to be so because of the enormity of the political proceeding initiated. An impeachment is not an occasion for hasty and indeliberate action.⁷⁹ It embodies the belief that before a judge can be removed from office he must have offended the Constitution to such a degree that the great weight of the Congress stands ready to convict him.⁸⁰ Any less stringent alternative would operate not to insure the general high quality of the federal judiciary—something which even the most ardent “non-exclusivist” will admit is already present—but to make the removal of federal judges easy.⁸¹

The scholarly dispute over the exclusivity of the impeachment process has served to fuel several legislative attempts to establish alternative means for removing federal judges. In each instance, however, Congress has rejected these proposals, concluding that if they were not unconstitutional, they were at least unwise. Some lessons should be drawn from this congressional experience.

U.S. CONST. art. II, § 1, who likewise may not be removed from office except by procedures expressly mandated by the Constitution. See U.S. CONST. art. II, § 4, and amend. XXV. *Accord*, Ervin 120; Otis, *supra* note 74, at 40-41.

79. See Thompson & Pollitt, *Impeachment of Federal Judges: an Historical Overview*, 49 N.C.L. REV. 87, 88 (1970).

80. The concept of impeachment as an offense against the public trust is implicit in the Framers' choice of the legislature as the proper impeachment forum. Hamilton clearly reflected this view in his explanation why the Senate was chosen as the forum for trying impeachments. See THE FEDERALIST No. 65, at 439. The essentially political nature of the offense also accounted, in Hamilton's view, for the choice of the legislative branch over the judicial branch as the source of all impeachments. *Id.* at 440. Advocates of *scire facias*, a procedure historically relegated to the removal of nontenured officials, see Otis, *supra* note 74, at 1, ignore the magnitude of the offense they seek to regulate, a betrayal of public trust. See also Feerick 24, 55.

81. This effort is misguided for another important reason: impeachment works. Even Joseph Borkin, a constant critic of the impeachment process, was forced to admit before a Senate subcommittee that mere institution of impeachment proceedings may achieve a desirable result, the resignation of a corrupt judge. *Hearings on S. 1506 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 101 (1969). See also Battisti, *supra* note 75, at 428-29.

Naturally, proponents of impeachment as the exclusive means of judicial removal have taken a more positive view of its effectiveness. Thompson & Pollitt, *supra* note 79, at 118. See generally *id.* at 92-118 and Feerick 25-47 for a history of judicial impeachments. Recent events concerning the executive branch also lend credence to the viability of the impeachment process.

Two such legislative proposals were made in the late 1930's. These were bills introduced by Senator McAdoo⁸² and by Congressman Sumners.⁸³ Both bills sought to vest the removal power in a special court with appeal to the Supreme Court.⁸⁴ Senator McAdoo proposed the creation of a court composed of the senior judges of the 10 circuit courts of appeals and the chief judge of the Court of Appeals for the District of Columbia.⁸⁵ Jurisdiction was to be limited to the trial of all federal judges, except justices of the Supreme Court, upon charges of misbehavior.⁸⁶ Prosecution was vested in the United States Attorney General.⁸⁷ Upon conviction, exhaustion of appeals, and notice thereof given to the President, the judge was to be automatically removed from office.⁸⁸

Congressman Sumners' proposal was a variant of the same theme.⁸⁹ His bill provided that, after resolution by the House of Representatives that there were reasonable grounds to believe that any judge of the United States other than circuit court judges or Supreme Court Justices was guilty of misconduct, the Chief Justice should convene a special court of circuit judges to try the matter.⁹⁰ Prosecution was entrusted to managers designated by the House;⁹¹ appeal to the Supreme Court was made available both to the prosecution and to the accused;⁹² and judgment was limited to removal from office.⁹³

Both bills were subjected to much debate and criticism. Both were eventually rejected.⁹⁴ The minority report filed when the Sum-

82. S. 4527, 74th Cong., 2d Sess. (1936); see 80 CONG. REC. 5933-39 (1936).

83. H.R. 2271, 75th Cong., 1st Sess. (1937); see 81 CONG. REC. 6157-96 (1937).

84. S. 4527, 74th Cong., 2d Sess. § 7 (1936); H.R. 2271, 75th Cong., 1st Sess. § 1 (1937); see 81 CONG. REC. 6193 (1937).

85. S. 4527, 74th Cong., 2d Sess. § 1 (1936); see 80 CONG. REC. 5937 (1936).

86. S. 4527, 74th Cong., 2d Sess. § 6 (1936).

87. *Id.*

88. *Id.* § 8.

89. The philosophical underpinning of the Sumners bill was clearly the *scire facias* argument of Professor Shartel. See note 74 *supra*. See also 81 CONG. REC. 6163-66 (1937). See generally P. FISH 154-55; Kurland, *The Constitution and Federal Judges: Some Notes From History*, 36 U. CHI. L. REV. 664, 689-91 (1969) [hereinafter cited as Kurland].

90. H.R. 2271, 75th Cong., 1st Sess. § 1 (1937).

91. *Id.*, as amended, 81 CONG. REC. 6193 (1937).

92. H.R. 2271, 75th Cong., 1st Sess. § 5 (1937).

93. *Id.*

94. See Kurland 693.

ners bill was introduced contained a fair sampling of negative congressional sentiment.⁹⁵ There it was advanced, in recommending the bill's rejection, that it would be constitutionally impermissible to bypass the only forum possessed of jurisdiction to pass on the good behavior of a federal judge—a duly convened court of impeachment.⁹⁶

The next serious attempt at legislation of this sort occurred in the late 1960's when Senator Tydings introduced a bill entitled the "Judicial Reform Act."⁹⁷ Title I of this bill sought to establish a Commission on Judicial Disabilities and Tenure.⁹⁸ The Commission, composed of judges appointed by the Chief Justice, would be empowered to investigate charges of misconduct and to recommend to the Judicial Conference the removal of a federal judge.⁹⁹ The Judicial Conference would be granted the power of removal with appeal to the Supreme Court by certiorari.¹⁰⁰ Complaints could be brought by "any person."¹⁰¹ Title I of the Tydings bill clearly proposed a procedure to circumvent the constitutionally mandated impeachment device.¹⁰² This proposal also received substantial support. Among its boosters were Deputy Attorney General Kleindienst, speaking for the Nixon Administration,¹⁰³ several prestigious circuit judges,¹⁰⁴ and the President of the American Bar Associa-

95. H.R. REP. NO. 537, 76th Cong., 1st Sess. 5 (1937).

96. See Emanuel Celler's eloquent defense of the exclusivist position. 81 CONG. REC. 6170-73, 6187 (1937).

97. S. 1506, 91st Cong., 1st Sess. (1969). See also accompanying bills S. 1507 through S. 1516, printed in 115 CONG. REC. 2732-45 (1969).

98. For a summary of S. 1506 see *Digest of Public General Bills and Resolutions, 91st Cong., 1st Sess.*, LEGIS. REF. SERV. A-97 (1969). See generally Battisti, *supra* note 75, at 426-28; Ervin 123.

99. S. 1506, 91st Cong., 1st Sess. § 101 (1969).

100. *Id.*

101. *Id.* § 102. The Tydings bill's grant of standing to "any person" to initiate investigations of a federal judge appears to present the gravest threat of possible harassment of district judges by dissatisfied litigants. See Battisti, *supra* note 75, at 429-32. The "willful misconduct" standard for removal does not seem to obviate that threat and certainly does not provide the same degree of protection for the independence of the judiciary as the impeachment standard enunciated in art. II. See note 76 *supra*.

102. See *Hearings on S. 1506, supra* note 81, at 2-3.

103. See *Hearings on S. 1506 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess.* 92-93 (1970).

104. Among the circuit judges speaking in favor of the Tydings measure were Judges Craven, see *id.* at 116-17, and Haynsworth, see *id.* at 136, of the Fourth Circuit, and Judge Maris, Senior Circuit Judge of the Third Circuit, see *id.* at 130.

tion.¹⁰⁵ Significantly lacking in enthusiasm for the proposal were the district judges, the foundation of our judicial system.¹⁰⁶ They realized that the bill was essentially aimed at them; and, perhaps better than some of their brothers on the circuit courts, they sensed the potentialities for abuse inherent in the measure.¹⁰⁷ The Tydings bill, like its predecessors, was allowed to die, notwithstanding the considerable efforts of those favoring its passage.

The most recent legislation along these lines was introduced by Senator Nunn of Georgia on March 7, 1975, and entitled the "Judicial Tenure Act."¹⁰⁸ In his introductory remarks, the Senator left no doubt about the bill's purpose:

My bill will provide an alternative removal procedure. This legislation is not intended in any way to displace the right of Congress to impeach judges under the Constitution. It is just another removal mechanism. This bill is based on the constitutional premise that the independent judicial branch, as the exclusive holder of federal judicial power, has the inherent power to enforce the standard of conduct required of its members. It provides machinery to implement this power.¹⁰⁹

Senator Nunn's proposal, patterned after the unsuccessful Tydings plan, calls for the creation of a Council on Judicial Tenure.¹¹⁰ The Council, composed of representatives of the circuits and the specialized courts,¹¹¹ is to act as an investigatory and prosecutorial

105. *Id.* at 121-22.

106. See discussion of the response to a letter sent to district judges for evaluation of the Tydings bill by the Senate Subcommittee on the Separation of Powers at note 47 *supra*. See also Ervin 124-25. See generally *Hearings on the Independence of Federal Judges Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 485-545 (1970).

107. Senator Tydings' bill was based upon California's system for judicial removal. But analogizing between the state and federal systems is misleading. In many instances state procedures are inapposite. In many states, for example, judges are subject to review through the elective process. In others, where the state constitutions, unlike the federal constitution, contain no impeachment provisions, the state clearly must provide other means for removal. Some commentators have been critical of using state procedures as models for an alternative procedure for removing federal judges. See, e.g., Kurland 668.

108. S. 1110, 94th Cong., 1st Sess. (1975). For text of the bill see 121 CONG. REC. 3407 (daily ed. Mar. 7, 1975). See also S. 4153, 93d Cong., 2d Sess. (1974), for the bill as originally introduced on October 7, 1974.

109. 121 CONG. REC. 3408 (daily ed. Mar. 7, 1975).

110. S. 1110, 94th Cong., 1st Sess. § 2(a) (1975).

111. *Id.* (proposed 28 U.S.C. § 377(b)).

agency.¹¹² If a panel of the Council concludes that there are grounds for suspecting the misbehavior or disability of a federal judge, it reports the case to the Judicial Conference of the United States along with recommendations.¹¹³ The Judicial Conference or one of its committees would then sit as a federal court to decide the case.¹¹⁴ The Council would act as an advocate for its recommendations in the proceedings before the Judicial Conference.¹¹⁵ The Conference could dismiss the complaint, or censure or remove the judge from office for misbehavior.¹¹⁶ In addition, a judge could be involuntarily retired if a mental or physical disability was seriously interfering with the performance of one or more of the critical duties of his office.¹¹⁷ The Nunn bill has received the qualified approval of the Judicial Conference.¹¹⁸

112. *Id.* Proposed 28 U.S.C. § 378(a) describes the council's investigatory role as follows:

It shall be the duty of the Council to receive and investigate each written complaint by any person concerning a Justice or judge of the United States and to determine whether the grounds specified . . . for removal of a Justice or judge from office or censure or . . . for involuntary retirement of a Justice or judge, exist. If, after a preliminary inquiry by the Chairman, any such complaint is found to be frivolous, unwarranted, or insufficient in law or fact, the Council may dismiss such complaint. If such complaint is not dismissed, a panel appointed under subsection (b) shall conduct a hearing with respect to the fitness of such Justice or judge.

113. *Id.* (proposed 28 U.S.C. § 378(d)).

114. *Id.* Proposed 28 U.S.C. § 379(a)(2) states: "The Conference . . . shall sit as a court to hear any cause relating to the removal, censure, or involuntary retirement of a Justice or judge of the United States When so sitting, the Conference . . . shall be a court of the United States"

115. *Id.* (proposed 28 U.S.C. § 379(b)).

116. *Id.* Proposed 28 U.S.C. § 379(d) sets out the powers of the Conference sitting as a court of removal:

The Conference . . . shall have the power in all cases brought before it, by majority vote—(1) to order the censure of any Justice or judge whose conduct is found to be inconsistent with the good behavior required by the Constitution;

(2) to order the removal of any such Justice or judge from office;

(3) to order the involuntary retirement of any Justice or judge in accordance with section 372(b) of this title; and

(4) to dismiss or remand (to the Council) any such case.

117. *Id.* (proposed 28 U.S.C. § 378(a)).

118. See *Judicial Conference Resolution of March 6, 1975*, printed in Council on Judicial Tenure, Judicial Conference Press Release (March 6, 1975). The Conference endorsement was subject to two significant qualifications. First, the Resolution suggested that "any reference to Justices of the Supreme Court be eliminated." Not only did the Conference find it "inappropriate for judges of inferior courts to pass judgment on the action" of Justices, but the Conference also claimed lack of jurisdiction over the Supreme Court. The Conference position in this respect endorses a distinction between the tenure of

This bill, like those which preceded it, is of doubtful constitutionality.¹¹⁹ Moreover, Senator Nunn, in his attempt to revive the Tydings bill, has run afoul of the same difficulty that beset the earlier measure.¹²⁰ Despite the Senator's protestations to the contrary,¹²¹ the obvious thrust of his bill is to provide a means for avoiding the difficult impeachment procedure. No one seeking the ouster of a judge would resort to the impeachment route rather than the stripped-down removal process outlined in the Nunn bill. Although it may be premature to speculate on the success or failure of this legislation, logically it ought to suffer the same fate as its prototypes.

Although congressional attempts to circumvent the impeachment provision have been singularly unsuccessful, the primary threat to judicial independence has passed from the Congress to the internal ranks of the judiciary itself. Undeterred by the congressional experi-

judges of inferior courts and the Justices of the Supreme Court, which ignores the directive of art. III, § 1 stating that *all* federal judges serve during good behavior. See note 74 *supra*.

The Conference's second suggestion was that judges only be relieved of further judicial duties and not removed from office. The resolution endorsed the exclusivist view that removal could only be accomplished through the impeachment process. It is questionable that the semantic distinction between pro tanto removal by relieving a judge of further duties and de jure removal from office will prove sufficient to circumvent the constitutionally mandated impeachment procedure. See *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 135-41 (Douglas, J., dissenting); *id.* at 141-43 (Black, J., dissenting). See also 21 RUTGERS L. REV. 166-67 (1966).

119. If the exclusivists are right, then the Congress has no power to alter the tenure of federal judges other than by amendment to the Constitution. See Note, *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448, 466-67 (1967). As Professor Kurland observed:

It should be kept in mind that the provisions for securing the independence of the judiciary were not created for the benefit of the judges, but for the benefit of the judged. It is not in the keeping of the judges to surrender this independence under pressure or voluntarily to give it away. Judicial independence is held in trust for the people and only they should determine whether they would like to exchange some judicial independence for more judicial efficiency.

Kurland 698. Many measures designed to curb judicial independence have been introduced as constitutional amendments, and the policy arguments on this issue are extensively discussed in *Hearings on S.J. Res. 44, H.R.J. Res. 194 and H.R.J. Res. 91, Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 83d Cong., 2d Sess., ser. 11 (1954); *Hearings on S.J. Res. 44 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 2d Sess., ser. 11 (1954); cf. S.J. Res. 16, 94th Cong., 1st Sess. (1975), Senator Byrd's recently introduced resolution for a constitutional amendment to require the reconfirmation of federal judges every 8 years.

120. See text accompanying notes 82-107 *supra*.

121. See text accompanying note 109 *supra*.

ence, a group of powerful but misguided judges has embarked on a course of action designed to establish a judicial alternative to the Sumners bill and its progeny. Without further legislative grant of authority, these men have sought to cast the existing administrative machinery into a role it was never intended to fill. Under the broad grant of authority in 28 U.S.C. section 332(d), they have sought to replace Congress with the circuit councils as the temporal judge of judicial behavior. The promulgation of the Code of Judicial Conduct as a means of evaluating a judge's conduct, both on and off the bench,¹²² and the recent Statement of Powers, Functions, and Duties of the Judicial Councils of the Circuits¹²³ lead to no other conclusion.¹²⁴ These actions, in violation of the doctrine of separation of powers and in clear contravention of express constitutional language, amount to nothing less than the substitution of "the appearance of impropriety"¹²⁵ for the constitutionally mandated "good behavior" standard of conduct for federal judges.¹²⁶

This mindless effort, when exposed to the light of day, inexorably reverts the federal judiciary to the subordinate state from which it was seemingly rescued by the adoption of the Constitution.¹²⁷ It graphically demonstrates how dangerous an ill-considered measure such as section 332(d) can be, if left on the books.

The Statement of Powers, Functions and Duties of the Judicial Councils of the Circuits approved by the Judicial Conference on March 7, 1974, merits closer scrutiny. According to Judge J. Skelly Wright, Chairman of the Subcommittee on Federal Jurisdiction of the Judicial Conference, and the Statement's principal draftsman, its primary purpose was to provide the circuit councils with uniform, authoritative guidelines concerning "the extent of their authority and responsibility."¹²⁸ The guidelines, it is said, are meant to be "flexible and nonmandatory in order that each council might draw on them as the particular needs in its circuit require."¹²⁹ He also stressed that the guidelines were drafted to avoid "emphasis . . . on disciplining judges, *although they do make clear the duty of councils*

122. See note 60 *supra* and accompanying text.

123. See note 34 *supra*.

124. See generally notes 28-34, 60 *supra* and accompanying text.

125. See Guideline No. 4.

126. The problem of overreaching by the Judicial Conference and the circuit councils is discussed in Ervin 125.

127. See note 2 *supra*.

128. Letter from J. Skelly Wright to Frank J. Battisti, Sept. 24, 1973, at 2.

129. *Id.*

in this respect and provide for guidance in this most sensitive area." 130

It is true that broad statements are contained in the guidelines indicating that circuit councils should not unduly interfere with the fundamental prerogatives of any judge. Guideline Number 3 underscores that "[i]t is vital that the independence of individual members of the judiciary to decide cases before them and to articulate their views freely be not infringed by action of a judicial council." And Guideline Number 6 states: "[m]onitoring the substance of judicial decisions is not a function of the judicial council." Moreover, limited due process guarantees are also provided¹³¹ as well as language encouraging continuous and meaningful dialogue with the district judges as to matters of mutual concern.¹³²

General disclaimers of overreaching and assurances of moderation, however, are clearly insufficient when one considers what is at stake. Judge Wright and his subcommittee, at the very least, ought to have drafted careful rules and regulations designed to assure the effective preclusion of circuit council activity in areas of acute sensitivity.¹³³ Since this was not done, the general disclaimers and assurances pale in significance when viewed against the broad, largely uninhibited discretion considered to be properly vested in the circuit councils.¹³⁴

In this regard, Guideline Number 4 is especially significant. It provides:

130. *Id.* (emphasis added).

131. See Guideline No. 6.

132. See Guidelines Nos. 5, 7, and 13.

133. This was one of the suggestions I made to Judge Wright in a letter dated March 20, 1973. Judge Wright and his subcommittee, however, concluded that such line-drawing was not necessary. Indeed, Judge Wright indicated in his letter of September 24, 1973, that it was his subcommittee's view that no clarifying legislation more specifically identifying the functions and duties of circuit councils was necessary, and that further clarification of the statute was a "judicial rather than a legislative responsibility." It is worth noting that Chief Justice Burger in the *Chandler* case expressed the opposite view. 398 U.S. at 85 n.6.

134. Emanuel Celler, then chairman of the House Judiciary Committee, commented on the broad grant of power to the circuit councils in his foreward to the *Judicial Council Report* of July 1961:

Since I, at the time, was a member of the Committee on the Judiciary of the House, I know it was the intention of the Congress to charge the judicial councils of the circuits with the responsibility for doing all and whatever was necessary of an *administrative* character to maintain efficiency and public confidence in the administration of justice.

H.R. Doc. No. 201, 87th Cong., 1st Sess. 1 (1961) (emphasis added).

The responsibility of the councils for the effective and expeditious administration of the business of the courts within its circuit extends not merely to the business of the courts in its technical sense (judicial administration) such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice) such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the court.¹³⁵

Guideline Number 4 unambiguously authorizes circuit councils to act as general overseers of district judges. Our brothers on the circuit courts are to be our "big brothers"; with the Canons of Judicial Ethics as their guide, and with the power to invoke sanctions as a weapon,¹³⁶ they stand ready to protect us, even from ourselves.

The Guidelines' broad construction of the powers conferred on the circuit councils by section 332(d) enjoys support in the measure's legislative history.¹³⁷ In addition, it was held in *In re Imperial "400" National, Inc.*,¹³⁸ that such a construction of section 332(d) would be constitutional.¹³⁹ As Judge Aldrich reasoned for the majority in that case:

It cannot be unconstitutional to authorize the courts to manage their own business. . . . The reasons seem clear. The individual district judge has his own docket to consider, and his own problems. There must be a body with a broader horizon and a broader responsibility, to oversee the district court as a whole, not just in regard to day-to-day operations and internal problems, but in the larger perspective of the court's place in the body politic.¹⁴⁰

This comfortable view of the circuit councils as platonic guardians of the body politic seems incongruous considering the circumstances in which it was taken. *In re Imperial "400" National, Inc.*, involved an instance of obvious circuit council overreaching. At issue was the validity of a resolution entered by the Circuit Council of the

135. See note 60 *supra*. See also *Report of the Judicial Conference of the United States on the Powers and Responsibilities of the Judicial Councils*, H.R. Doc. No. 201, 87th Cong., 1st Sess. 3 (1961).

136. Guideline No. 15 provides in ambiguous yet forceful language: "Where any formal order of the circuit council is not complied with, the matter may be referred to the Judicial Conference of the United States, or the circuit councils may take other appropriate action." (Emphasis added.)

137. See text accompanying notes 39-42 *supra*.

138. 481 F.2d 41 (3d Cir. 1973).

139. *Id.* at 45.

140. *Id.* at 45-46.

Third Circuit on February 10, 1972, providing that in all bankruptcy proceedings no lawyer could act as attorney for the trustee and represent a third party who submits a plan for reorganization.¹⁴¹ This resolution was adopted against a background of circuit court displeasure with the way the reorganization of Imperial "400" National, Inc., a chain of motels, was being handled by the district court. The council's essential purpose was to coerce the district court into removing the counsel for the trustee in reorganization because of an apparent conflict of interest.¹⁴² Despite obvious reluctance, the district court terminated the attorney's retainer in accordance with the circuit council's resolution.¹⁴³ An appeal from this order, and the dismissal of a petition of mandamus directed against the council,¹⁴⁴ was taken

141. *Resolution of the Judicial Council of the Third Circuit*, Feb. 10, 1972. But see 11 U.S.C. § 557 (1970), which does not require complete disinterestedness of a trustee's counsel. See also 481 F.2d at 48-49.

142. The apparent conflict of interest was that a proposed plan for reorganization was submitted by a client of the firm of the trustee's counsel. The attorney excused himself from any participation in consideration of the reorganization plans but continued to represent the trustee in other capacities. See 481 F.2d at 43.

143. The district judge complied with the resolution only after receiving direct written correspondence from the Chief Judge of the Third Circuit Court of Appeals urging him to do so. *Id.* at 45.

144. This case raises the question of what route a litigant must take to obtain relief from a circuit council order, a question which a majority of the Supreme Court avoided in *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 86, 87 n.8 (1970). But see *id.* at 89 (Harlan, J., concurring); *id.* at 133 (Douglas, J., dissenting); *id.* at 141 (Black, J., dissenting). The appellant in *In re Imperial "400" National, Inc.*, appealed from both the order of the district court based upon the circuit council resolution removing him from office and the denial of his petition for a writ of mandamus or declaratory judgment against the council. 481 F.2d at 42. The majority stated that it was directly reviewing the order of the district court. Although it admitted the order was based on the circuit council resolution, the court drew no distinction between review of this action and review of a district court order substantively based on a statutory order. See *id.*

Judge Lumbard in dissent argued that the district court had no power to entertain a petition to mandamus the circuit council. His position is based upon the view that the circuit council is actually the alter ego of the court of appeals and thus the district court is without power to review the decision of a superior tribunal. He concluded: "[T]he order of the council was and is the law of the circuit." *Id.* at 50 (emphasis added).

The great weight of the legislative history, see text accompanying notes 17-28, 35-40 *supra*, and the nature of the assignments carried on by the councils support the majority's characterization of the councils' function as administrative rather than judicial. The false assumption that the councils were created as tribunals for disciplining district courts is at the bottom of recent efforts to inflate their duties and powers beyond lawful limits. See note 175 *infra*.

by the attorney and was assigned to a panel of senior circuit judges from outside the Third Circuit.¹⁴⁵

Judge Aldrich, despite his willingness to construe section 322(d) broadly,¹⁴⁶ nevertheless indicated that the majority was "deeply troubled by what occurred in the . . . case."¹⁴⁷ He saw "no reason why a judicial council, sitting as an administrative body, cannot, short of exercising traditional judicial functions . . . enact appropriate rules, or resolutions, applicable to all courts within its circuit."¹⁴⁸ Yet he observed: "The difficulty here is that the council was not alerted to any general need. Although not so couched, the resolution was not only triggered by, but tailored to, a case quite apparently unique. . . . The action comes uncomfortably close, perhaps too close, to a function denied to the Council, the exercise of 'traditional judicial powers.'"¹⁴⁹

Judge Aldrich was particularly troubled by the lack of procedural due process afforded the attorney before the "in personam" resolution was enacted.¹⁵⁰ He was granted no hearing before the council, and the information upon which the council based its action was shown to be both inaccurate and incomplete.¹⁵¹ Judge Aldrich observed that "summary action by the council was manifestly unnecessary. . . . Indeed we suggest that summary action in the circumstances of this case, rather than serving any important governmental interest, constituted an inadvertant disservice to the concept of circuit councils."¹⁵²

The ultimate ruling in *In re Imperial "400" National, Inc.*, was to remand the case to the district court so as to afford the appellant a full evidentiary hearing on his claims—in effect, the circuit coun-

145. The panel consisted of Judges Lumbard and Smith of the Second Circuit and Judge Aldrich of the First Circuit. The active judges of the Third Circuit recused themselves from hearing the appeals. Judge Lumbard, in dissent, criticized the procedure. He voiced the view that these judges should have sat as the court of appeals en banc. 481 F.2d at 49, 50 n.1. *But see* Justice Harlan on the incongruity of predicating equitable relief upon appeal to a tribunal one alleges is without authority to act. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 91 (Harlan, J., concurring). *See also* 398 U.S. at 132-33 (Douglas, J., dissenting); H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 301 n.4 (2d ed. 1973).

146. *See* 481 F.2d at 45-46.

147. *Id.* at 46.

148. *Id.*

149. *Id.* at 47; *see* P. FISH 392. *But see id.* at 436.

150. 481 F.2d at 47.

151. *Id.*

152. *Id.* at 47-48.

cil's resolution was nullified. The case nevertheless demonstrates how easy it is, absent any meaningful restraints, for the circuit councils to abuse their powers. It is worth stressing, moreover, that the attorney in this case was at least afforded an avenue for full review of council action by appeal, a review which was obviously necessary. The *Chandler* decision, however, indicates that there is no such guarantee of judicial review of council action *directed against a district judge*.¹⁵³

Judge Wright's guidelines are, of course, predicated on the assumption that the members of the circuit councils are reasonable men and can be relied on to exercise their discretion with abiding respect for the ideal of an independent judiciary. They are "schooled to listen to evidence and to grasp complex issues, trained (one hopes) in more dispassionate judgment than a politician."¹⁵⁴

Yet our system of government was structured by the Founding Fathers so as to avoid reposing the essential viability of our institutions on the continued good faith of men. It is about time that judges begin to view themselves for what they are—human beings, not leviathans. The circuit councils, like other authorities, are clearly capable of abusing their powers. And if their powers are so construed that they are able to judge their brethren on the district bench and render sanctions without meaningful restraints, the results can be disastrous to the very conception of our government. Those who deny that the broad powers of the councils, as approved in particular by Guideline Number 4, are not susceptible to abuse, need only be referred to those unfortunate circumstances in Oklahoma involving Judge Chandler.

On December 13, 1965, a special session of the Judicial Council of the Tenth Circuit issued an order effectively removing Chief Judge Chandler of the Western District of Oklahoma from his office.¹⁵⁵ Prior to that time, Judge Chandler had been involved as

153. See notes 155-76 *infra*.

154. R. BERGER, *supra* note 73, at 156.

155. The circuit council's order of December 13 directed that:

[U]ntil the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other judges of said court; and that until the further order of the Judicial Council no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever.

It is further ordered that in the event the active judges of the

a defendant in a considerable amount of litigation of both a civil and criminal nature.¹⁵⁶ In addition, he had been "the subject of two applications to disqualify him in litigation in which . . . [he] had refused to disqualify himself."¹⁵⁷ In short, the council's action was the culmination of a long-standing controversy between a district judge and the judges of his circuit.¹⁵⁸ The council prefaced its order with a finding that:

Judge Chandler is presently unable or unwilling to discharge efficiently the duties of his office; that a change must be made in the division of business and the assignment of cases in the Western District of Oklahoma; and that the effective and expeditious administration of the business of the United States District Court for the Western District of Oklahoma requires the orders herein made.¹⁵⁹

In response, Judge Chandler filed a motion with the Supreme Court for leave to file a petition for a writ of mandamus, or alternatively, a writ of prohibition addressed to the Tenth Circuit Judicial Council.¹⁶⁰ He also filed an application for stay on the order.¹⁶¹ Judge Chandler's stay application was denied on the ground "that the order from which relief is sought . . . [was] entirely interlocutory in character"¹⁶² The Court nevertheless directed that "prompt further proceedings" be undertaken with full procedural due process af-

United States District Court for the Western District of Oklahoma, including Judge Chandler, cannot agree among themselves upon the division of business and assignment of cases made necessary by this order, the Judicial Council, upon such disagreement being brought to its attention, will act under 28 U.S.C. § 137 and make such division and assignment as it deems proper.

398 U.S. at 78.

156. The civil suit, charging Judge Chandler with malicious prosecution, was ultimately dismissed. *O'Bryan v. Chandler*, 249 F. Supp. 51 (W.D. Okla. 1964), *aff'd en banc*, 352 F.2d 987 (10th Cir. 1965), *cert. denied*, 384 U.S. 926 (1966). The criminal indictment charging conspiracy to cheat and defraud the state of Oklahoma was quashed. *See* 398 U.S. at 77 n.4.

157. In both cases seeking Judge Chandler's disqualification, including the one which precipitated council action, writs of mandamus had been issued by the court of appeals. *See* *Occidental Petroleum Corp. v. Chandler*, 303 F.2d 55 (10th Cir. 1962) (*en banc*); *Texaco, Inc. v. Chandler*, 354 F.2d 655 (10th Cir. 1965) (*en banc*). *See also* 398 U.S. at 77 n.4; note 59 *supra* and accompanying text.

158. *See* 398 U.S. at 77.

159. *Id.* at 77-78.

160. *Chandler v. Judicial Council of the Tenth Circuit*, 382 U.S. 1003 (1966).

161. *Id.*

162. *Id.*

forded.¹⁶³ What would seem to have been an almost insulting reminder to the circuit council that it should not do anything further without first giving Judge Chandler a hearing was apparently necessary. For as was pointed out in a brief submitted by the Judge's attorneys, the council had previously given Chandler

no notice of the calling of the Special Session or its purposes, . . . no opportunity to be present during the deliberations of the Special Session, no opportunity to rebut complaints, cross-examine accusers, or present explanations or evidence in his own behalf, and no opportunity to be represented at the Special Session by counsel.¹⁶⁴

Chandler's attorneys concluded: "He was deprived of liberty and property by secret and summary procedures so shocking that they recall those of the British Star Chamber."¹⁶⁵

Significantly, Mr. Justice Black, with whom Mr. Justice Douglas joined, vigorously dissented from the majority's action.¹⁶⁶ Justice Black felt that the Court should have stayed the order. He saw no authority for such an order conferred on the council by virtue of section 332(d):

There is no language whatever in this or any other Act which can by any reasonable interpretation be read as giving the council a power to pass upon the work of district judges, declare them inefficient and strip them of their power to act as judges. The language of Congress indicates a purpose to vest the Judicial Council with limited *administrative* powers; nothing in this language, or the history behind it, indicates that a council of circuit judges was to be vested with power to discipline district judges, and in effect remove them from office. This is clearly and simply a proceeding by circuit judges to inquire into the fitness of a district judge to hold his office and to remove him if they so desire. I do not believe Congress could, even if it wished, vest any such power in the circuit judges.¹⁶⁷

A number of confusing months followed this initial action, or inaction, by the Supreme Court. Finally, however, on February 4, 1966, the council ordered Judge Chandler to continue to sit on cases pending before him prior to December 28, 1965, the effective date

163. *Id.* See also 398 U.S. at 79.

164. Brief for Petitioner at 10, cited in *Chandler v. Judicial Council of the Tenth Circuit*, 382 U.S. 1003 (1966).

165. *Id.*

166. 382 U.S. at 1004.

167. *Id.* at 1005.

of the December 13 order.¹⁶⁸ Chandler apparently acquiesced in this order.¹⁶⁹ He continued, however, to press the Court to confront the issues raised by his case, in particular, whether the actions taken by the council impermissibly infringed on judicial independence, and represented, in effect, a usurpation of the impeachment power.¹⁷⁰ These issues, however, were never passed on by the Court.¹⁷¹ Instead, Chief Justice Burger, writing for the majority, denied Chandler's motion on the ground that he had failed to make a case for extraordinary relief.¹⁷² Mr. Justice Harlan concurred in the re-

168. See 398 U.S. at 80.

169. Judge Chandler explained his apparent acquiescence in a brief submitted to the Supreme Court disputing a suggestion that the controversy was moot. See *id.* at 81. There he asserted that his agreement to abide by the council's order to divide the business of the district was a "strategy" to prevent triggering of the grant in 28 U.S.C. § 137 (1970) of such authority to the circuit council when the district judges are unable to agree upon the distribution of business and assignment of cases. The Solicitor General, who had originally raised the issue of mootness, later submitted a supplemental memorandum withdrawing the suggestion. See 398 U.S. at 81. See also *id.* at 87 (majority's criticism of this strategy). But see *id.* at 92 (Harlan, J., concurring); *id.* at 132-33 (Douglas, J., dissenting).

170. The council's order of December 13 reassigning all cases presently pending or assigned to Judge Chandler was nothing less than an order of removal. As his counsel vividly stated in his brief, the council had "stripped Judge Chandler of his judicial authority and powers and left him only the shell of his office . . . his office space, his desk, his robe hanging in the closet." Brief for Petitioner, *supra* note 164, at 17; see P. FISH 423. The order of February 4 modified the December order and returned to Judge Chandler cases pending prior to December 28, 398 U.S. at 80, but this still relegated him to the status of a "second-class judge" depriving him of the full power of his office and the right to share equally with all federal judges in the privileges and responsibilities of the Federal Judiciary." *Id.* at 142 (Black, J., dissenting).

171. The majority characterized the issue before the court as "whether Congress can vest in the Judicial Council power to enforce reasonable standards as to when and where court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and many other routine matters." 398 U.S. at 84. The majority completely avoided the real issue raised by Judge Chandler, whether the creation of Congress, the Judicial Councils, could place restrictions on a federal judge so that he is effectively removed from office. See *id.* at 142 (Black, J., dissenting).

172. *Id.* at 89. The alternative avenues of relief to which Chief Justice Burger alluded were an appearance before the council to challenge their jurisdiction to issue such an order, *id.* at 87-88, and some sort of agreement with his fellow district judges for a more equitable distribution of business under 28 U.S.C. § 137 (1970). 398 U.S. at 87. He also mentioned, without comment, the possibility of bringing an action in the nature of mandamus against the council in the district court. See *id.* at 87 n. 8. But see note 144 *supra*. Although he expressly declined to reach the jurisdictional question on the nature of the council's authority, which Justice Harlan discussed at length, 398 U.S. at 95, 111, Chief Justice Burger strongly suggested that council action is

sult,¹⁷³ and Justices Douglas and Black again found themselves in vigorous dissent.¹⁷⁴ Regardless of the merits of various positions

administrative, not judicial, and a fortiori beyond the Court's appellate jurisdiction to issue the writ. *See id.* at 83 n.5, 86 n.7, 88 n.10.

173. Justice Harlan agreed with the dissenters that the Court should have reached the merits of Judge Chandler's complaint. *Id.* at 89. Harlan concluded that the circuit councils, at least in the issuance of orders to district judges to regulate the exercise of their official duties, act as judicial tribunals for purposes of the Supreme Court's appellate jurisdiction under art. III. *Id.* at 102. Accordingly, an application for an extraordinary writ directed against a circuit council falls within the Court's jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a) (1970). 398 U.S. at 117. However, on the merits, Justice Harlan concurred in the denial of the writ because he felt that the order of February 4 was within the scope of council authority under § 332(d). *Id.* at 119. Under a belief that the order of February 4 superseded the December 13 order, Justice Harlan refused to regard the action taken against Judge Chandler as a "removal." *Id.* Rather, he characterized the council's action as "an effort to move along judicial traffic in the District Court." *Id.* Since he believed that the removal issue was not presented, Justice Harlan proceeded to analyze the council's power under § 332 on the assumption that the facts on their face only presented a temporary freeze on the judge's docket while he disposed of pending cases. *Id.* at 126.

174. Justice Douglas agreed with Justice Harlan that the circuit council was a judicial tribunal for the purposes of the Supreme Court's appellate jurisdiction when "it moves to disqualify a judge from sitting, removing him *pro tanto* from office, [moving] against the individual with all of the sting and much of the stigma impeachment carries." 398 U.S. at 135. In such instances, he argued, there is a case or controversy arising from an inferior tribunal for mandamus to attach. *Id.* On the merits, however, he disagreed entirely with Harlan on the nature and gravity of the council's action:

What the Judicial Council did when it ordered petitioner to "take no action whatsoever in any case or proceeding now or hereafter pending" in his court was to do what only the Court of Impeachment can do. If the business of the federal courts needs administrative oversight, the flow of cases can be regulated But there is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge.

Id. at 136-37. *See also* note 181 *infra* and accompanying text.

Justice Black, concurring in Justice Douglas' dissent, felt compelled to comment on the grave threat to judicial independence presented by the council's exercise of the power of judicial removal:

This case must be viewed for what it is—a long history of harassment of Judge Chandler by other judges who somehow feel he is "unfit" to hold office. Their efforts have been going on for at least five years and still Judge Chandler finds no relief. What is involved here is simply a blatant effort on the part of the council through concerted action to make Judge Chandler a "second-class judge," depriving him of the full power of his office and the right to share equally in the privileges and responsibilities of the Federal judiciary. I am unable to find in our Constitution or in any statute any authority whatever for judges to arrogate to themselves and to exercise such powers. Judge Chandler, like every other judge including the Justices of this

taken by members of the Court on the "very knotty jurisdictional problem" presented in *Chandler*,¹⁷⁵ the point to be made here is that the *Chandler* case poignantly demonstrates the extremes to which a circuit council may reach.

The *Chandler* case was "the liveliest, most controversial contest involving a federal judge in modern United States history."¹⁷⁶ It manifests, in my view, the most egregious abuse of power, discretion, and plain good taste. Yet *Chandler* must not be viewed as standing alone, an isolated instance of circuit council overreaction in dealing with a district judge. I, for one, am aware of a number of other such instances, and I am sure there are many more I am not aware of.

In the Sixth Circuit, where I serve as district judge, three examples readily come to mind. The matter of Judge Mell G. Underwood is, by far, the most unfortunate. There a circuit council resolution was passed in March 1965 labelling Underwood "incompetent," and "asking" him to retire. The resolution somehow found its way to the press, and a deliberate and humiliating campaign then ensued to force this judge of 30 years' experience off the bench.¹⁷⁷

Judge Underwood may not have been a great judge in 1965; the duties of his office may have become too burdensome for him. Yet,

Court, is subject to removal from office only by the constitutionally prescribed mode of impeachment.

398 U.S. at 142. See text accompanying notes 11-14 *supra*.

175. See discussion in notes 172-74 *supra*. It is beyond the scope of this article to delve into the difficult jurisdictional problem of the proper route of appeal from council action. However, it is crucial to note the difference between the argument that the circuit councils constitute inferior courts for the purpose of providing Supreme Court appellate review of council orders and the argument that the councils, by setting themselves up as tribunals for disciplining federal judges, have overstepped the bounds established by Congress when they were created as essentially administrative bodies. See, e.g., Ervin 125. The latter position may concede that the councils are subject to the appellate jurisdiction of the Court without compromising the real thrust of their criticism—that council jurisdiction under § 332 runs to matters of judicial administration, not to the power to discipline federal judges, and, in effect, remove them from office. See, e.g., *Chandler v. Judicial Council of the Tenth Circuit*, 382 U.S. 1003, 1005 (1965) (Black, J., dissenting); accord, P. FISH 424.

176. 398 U.S. at 130 (Douglas, J., dissenting).

177. In explanation of why the circuit council adopted a campaign to drive Judge Underwood from the bench, the chief judge of the circuit stated that he "just wasn't doing much work" and "a number of mandamus cases were filed against him in our court." See *Hearings on Federal Judges and Courts Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 381 (1969).

the sledgehammer tactics and sanctions utilized by the circuit council when Underwood indignantly and understandably first reacted to the circuit council's "secret" resolution were clearly unnecessary.¹⁷⁸ It would have been far better if the council had placed more reliance on Judge Underwood's perception of his own abilities and left the matter largely to his fellow judges on the district court, his friends, and his family. As a friend and colleague of Judge Underwood's at that time, I believe that this whole matter could have been handled with far more discretion and far less cruelty. A vendetta was inappropriate, degrading, and an abuse of power.

In the last few years, two district judges of this circuit felt it necessary to permit television interviews, off the bench, relating to matters in litigation before them. Both judges took such steps so that the public might better understand certain orders entered in cases of enormous controversy and importance. In each instance, however, the Judicial Council for the Sixth Circuit once again acted summarily without affording either of the judges a hearing. Both were reprimanded; and despite some efforts at discretion, this information reached the news media. In consequence, both judges were at best offended, at worst humiliated. They knew that the council had, once again, impermissibly intruded upon a district judge's handling of matters before his court. They were also aware that any public response would only further erode respect for the federal judiciary.

District court judges are in the forefront of the litigation process in the federal courts. They are regularly in close personal contact with controversial issues, emotional settings, and volatile personalities. Their decisions may bestir bitter feelings in litigants. These judges, if they are to be able to perform their duties effectively, must be substantially immune from intimidation, no matter what the source. And they must not have to live with the fear that they may have to face proceedings in the nature of disbarment brought or instigated by disgruntled litigants.¹⁷⁹

It is my view that section 332(d), if allowed to remain on the

178. The resolution relating to Judge Underwood was passed without first affording him any modicum of due process. When presented with the resolution, Underwood was reported to have retorted: "They have no authority to remove me, and they've found that out. I told them to go to hell" See P. FISH 412.

179. Such proceedings are by their very nature fraught with much emotion and recrimination. If there be any doubt, I refer you to the opinion I wrote relating to the dismaying disbarment of John Ruffalo, Jr. See *In re Ruffalo*, 249 F. Supp. 432 (N.D. Ohio 1965).

books, will not be used in the case of a corrupt judge who may have violated one or many criminal statutes. Rather, it will be used, as in *Chandler* (but hopefully with more restraint), when a circuit council is given some grounds, reliable or not, to believe that a judge is feeble, lazy, slow, incompetent, and the like, or that a judge's actions have "the appearance of impropriety."¹⁸⁰ The effect will be to discourage nonconformity and imbue a district judge with the feeling that someone is always looking over his shoulder. Corruption will not be eliminated, but nonconformists and worthy opponents will be. Our system was not meant to operate in this fashion; its very integrity and healthy development rest on the assurance that our judges are, in fact, free from such interference. As Mr. Justice Douglas said in his dissent in *Chandler*:

[T]here is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge.

The mood of some federal judges is opposed to this view and they are active in attempting to make all judges walk in some uniform step. What has happened to petitioner is not a rare instance; it has happened to other federal judges who have had perhaps a more libertarian approach to the Bill of Rights than their brethren. The result is that the nonconformist has suffered greatly at the hands of his fellow judges.

The problem is not resolved by saying that only judicial administrative matters are involved. The power to keep a particular judge from sitting on a racial case, a church-and-state case, a free-press case, a search-and-seizure case, a railroad case, an antitrust case, or a union case may have profound consequences. Judges are not fungible; they cover the constitutional spectrum; and a particular judge's

180. Guideline No. 4. There is no room in our system for such broad and subjective valuations of a judge's abilities. The Founding Fathers discussed and rejected "inability" as a standard for judicial removal because of the grave likelihood it would open the door to manipulation. The *FEDERALIST* No. 79, at 533.

Unfortunately, the judiciary is just as susceptible to misuse of power as the Congress or Executive. As Justice Douglas points out, judges are clearly not above efforts to make use of administrative institutions to influence their brethren on the bench. See 398 U.S. at 137 (Douglas, J., dissenting); text accompanying note 181 *infra*. See also P. FISH 436. The Framers certainly were aware that throughout the long history of the Republic there would be a few judges who would betray their commissions. However, as Senator Ervin points out, the balance was struck long ago in favor of an independent judiciary. Ervin 127.

emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about "shopping" for a judge; senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.

These are subtle, imponderable factors *which other judges should not be allowed to manipulate to further their own concept of the public good.*¹⁸¹

In short, section 332(d) ought to be repealed. The councils it empowers operate to exacerbate relations among federal judges. They are susceptible to far-reaching abuse at the hands of certain judges bent on imposing their own values and inclinations on all other judges. At the same time, the councils serve no useful present-day administrative function; ironically, they often tend to delay needed change at the district court level.

As a district judge concerned with the continued vitality of our federal judiciary, I must speak out now against this ill-considered and dangerous measure. Senator Sam Ervin has noted on numerous occasions: "To me, the duty of a federal judge is to decide cases and controversies—not to meddle in the business of his colleagues." I agree.

181. 398 U.S. at 137 (emphasis added).